



## **Case Summary**

Michael Hickingbottom appeals the denial of his petition for post-conviction relief. We affirm.

## **Issue**

Hickingbottom raises the three issues, which we consolidate and restate as whether he received ineffective assistance of trial counsel.

## **Facts**

On October 15, 2004, at his third trial, a jury convicted Hickingbottom of murdering David Reed. On direct appeal, a panel of this court affirmed Hickingbottom's conviction. See Hickingbottom v. State, No. 45A03-0502-CR-77 (Ind. Ct. App. Feb. 8, 2006), trans. denied. Hickingbottom then sought post-conviction relief alleging that he received ineffective assistance of trial counsel. Following a hearing, the post-conviction court denied Hickingbottom's petition. He now appeals.

## **Analysis**

A petitioner for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When a petition for post-conviction relief is denied, the petitioner appeals a negative judgment because he or she had the burden of establishing the grounds for relief before the post-conviction court and did not meet that burden. See Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000). The petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Id. Although we owe no deference to the post-conviction court's conclusions of law, when

reviewing factual matters, we examine only the probative evidence and reasonable inferences supporting the post-conviction court's determination and do not reweigh the evidence or judge the credibility of the witnesses. Taylor v. State, 717 N.E.2d 90, 92 (Ind. 1999).

To establish a claim of ineffective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). “First, a defendant must show that counsel’s performance was deficient.” Id. at 152. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as guaranteed to the defendant by the Sixth Amendment. Id. “Second, a defendant must show that the deficient performance prejudiced the defense.” Id. This requires a defendant to show that counsel’s errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. Id. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Id.

Hickingbottom argues that he received ineffective assistance of counsel because trial counsel failed to object to testimony that he robbed the victim the night before the murder. During the third trial, the State called Maurice Reed to testify. Maurice witnessed the murder, but did not testify at the previous trials. Maurice testified that the

night before David was murdered, Hickingbottom robbed David. Maurice also testified that the next day, Hickingbottom and David got into a fight. After the fight ended, Hickingbottom walked away. Hickingbottom returned with a .22 rifle, kicked open the door to house where David was, and shot David.

Immediately prior to the start of trial, trial counsel argued a motion in limine regarding Maurice's testimony that Hickingbottom robbed David the day before the murder. The trial court denied Hickingbottom's motion and stated, "There is a – notion of inextricably bound, this incident fits those parameters. I think the jury is entitled to hear that evidence. It goes to the weight not the admissibility. However, I don't want this witness speculating as to what he thinks happened." Trial Tr. p. 35. Trial counsel did not object to Maurice's testimony regarding the robbery at trial. Hickingbottom contends that trial counsel's failure to object amounts to ineffective assistance of counsel.

In addressing a similar argument, our supreme court has stated:

Counsel cannot be faulted for failing to make an objection which had no hope of success and which might have the adverse effect before the jury of emphasizing the admissibility of appellant's statement. Failure to object to admissible evidence does not constitute ineffective assistance of counsel; a defendant must show that had a proper objection been made the court would have had no choice but to sustain it.

Garrett v. State, 602 N.E.2d 139, 141 (Ind. 1992).

Hickingbottom argues that the robbery evidence was admitted in violation of Indiana Evidence Rule 404(b) as evidence of his propensity to commit crimes. A trial court's ruling on the admissibility of evidence is discretionary and is reviewed for an

abuse of discretion. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). Generally, although evidence of prior uncharged misconduct may not be admitted for the purpose of proving a defendant's bad character, it may be admitted for other purposes, such as "proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. (quoting Ind. Evidence Rule 404(b)). Indiana Evidence Rule 404(b) "does not bar, however, evidence of uncharged criminal acts that are 'intrinsic' to the charged offense." Id. As we have observed:

Other acts are "intrinsic" if they occur at the same time and under the same circumstances as the crimes charged. By contrast, the paradigm of inadmissible evidence under Rule 404(b) is a crime committed on another day in another place, evidence whose only apparent purpose is to prove the defendant is a person who commits crimes. Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted.

Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007) (quotations and citations omitted), trans. denied.

Although the robbery at issue here occurred the day before the shooting, it was within the trial court's discretion to conclude that it was an intrinsic act because it occurred at the same location and involved the same victim and was relatively close in time. Hickingbottom has not shown that had trial counsel made a proper objection at trial, the trial court "would have had no choice but to sustain it." See Garrett, 602 N.E.2d at 141. Hickingbottom has not established that trial counsel's failure to object fell below an objective standard of reasonableness.

Hickingbottom also argues that he received ineffective assistance of counsel when trial counsel failed to object to or move for a mistrial for a trial court security guard's inappropriate comment to a juror. The trial court explained that as the jury was being led to the cafeteria during lunch:

One of the jurors . . . apparently had a conversation with one of our uniformed security guards. They exchanged a brief greeting, they embraced. The court security guard then asked the juror what he was down here for and he said I'm on trial at which time the security guard said well, find him guilty.

Trial Tr. p. 566. Trial counsel requested that the juror be removed and that the alternate be seated in his place. The State agreed, and the juror was dismissed. The trial court also questioned the jury as to whether they heard the substance of the conversation that took place between the juror and the security guard and all of the remaining jurors answered in the negative.

Hickingbottom contends that trial counsel should have objected to the trial court's questioning of the remaining the jurors because in a "trick question" it only asked whether they overheard the "conversation" and did not ask about the "comment" made by the security guard. Appellant's Br. p. 21. This is a distinction without a difference. All of the parties were apprised of the situation, defense counsel requested the removal of the juror, and the remaining jurors indicated they did not overhear the "substance of the conversation." Id. at 577. In the absence of any evidence to the contrary, Hickingbottom has not established that trial counsel's actions to remedy the problem fell below an objective standard of reasonableness.

Finally, Hickingbottom argues that his first trial counsel was ineffective for failing to move for discharge based on an alleged speedy trial violation. The post-conviction court considered this issue waived because Hickingbottom did not include it as an alleged error in his post-hearing argument that he submitted to the post-conviction court.

To avoid waiver, Hickingbottom argues that the trial court erred by not allowing him to subpoena the attorney who represented him during the first two trials so that he could establish this claim of ineffective assistance of counsel. However, he provides no legal analysis of how the subpoena process is used for post-conviction purposes or how the trial court improperly interfered with that right. Moreover, based on the chronological case summary and the post-conviction relief hearing testimony, it appears that throughout the course of the proceedings Hickingbottom's attorneys filed motions for release and motions to dismiss based on the speedy trial issue. Without more, Hickingbottom has not established either that the trial court erred in denying his motion or that he was denied effective assistance of counsel on the speedy trial issue.

Hickingbottom has not demonstrated that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. He has not established that he received ineffective assistance of trial counsel.

### **Conclusion**

The post-conviction court properly denied Hickingbottom's petition for relief. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.